

Unmasking Demeanor

Julia Simon-Kerr*

Demeanor is seen as a critical tool for assessing credibility in U.S. courtrooms. From the Confrontation Clause to the Immigration and Nationality Act to the Federal Rules of Civil Procedure to the common law of credibility, the U.S. legal system gives preference to demeanor as a key input to credibility judgments. Evidence law instructs that we must see a witness's whole face in order to effectively "read" demeanor. Yet, a growing number of jurisdictions will require all participants in the courtroom to wear masks covering the nose, mouth, and chin in order to prevent the spread of COVID-19. This Essay canvasses the legal impediments to mask-wearing by witnesses. It argues that these legal obstacles are surmountable and that this mask-wearing moment offers a unique opportunity to reassess the role of demeanor in credibility assessments. Focusing on demeanor forces witnesses to perform credibility, a performance that does not necessarily bring us closer to the truth.

INTRODUCTION

Among the changes being wrought by the COVID-19 pandemic is the decision by a growing number of jurisdictions to order witnesses to testify in court while wearing face masks. Masks are already mandatory in public spaces in a growing number of states,¹ and an increasing number of jurisdictions have explicitly made masks mandatory for participants in courtroom proceedings. For example, the Connecticut judiciary's website explains that pursuant to the Governor's order requiring masks in public, "no person is permitted to enter a Judicial Branch courthouse or facility without covering his/her mouth and nose with a mask or cloth face-covering."² In Oregon, courts are providing face masks to help ensure compliance with the governor's order to wear masks in indoor public spaces.³ Other states that have required masks in the courtroom include Indiana, Iowa, Kansas, New

* Julia Simon-Kerr, Professor of Law, The University of Connecticut School of Law. I wish to thank Kiel Brennan-Marquez, Jamelia Morgan, Bennett Capers, and Virginia Kerr for their very helpful comments, and Morgen Barroso for her research assistance.

¹ See Allen Kim, Scottie Andrew & James Froio, *These Are the States Requiring People to Wear Masks When Out in Public*, CNN (Aug. 12, 2020, 5:44 PM), <https://www.cnn.com/2020/06/19/us/states-face-mask-coronavirus-trnd/index.html> [<https://perma.cc/HK6P-MWZR>].

² *COVID-19 Information from the Connecticut Judicial Branch*, ST. OF CONN. JUD. BRANCH, <https://jud.ct.gov/COVID19.htm> [<https://perma.cc/8XVS-CEXW>].

³ See Kate Williams, *Sweet Home Man Who Refused Judge's Order to Wear Mask in Courtroom Jailed for Contempt*, OR. LIVE (June 26, 2020), <https://www.oregonlive.com/coronavirus/2020/06/maskless-sweet-home-man-briefly-jailed-for-contempt-after-leaving-courtroom-where-masks-were-required.html> [<https://perma.cc/REZ8-DCLQ>].

Mexico, New York, Ohio, Tennessee, and West Virginia.⁴ As more states prepare to resume jury trials this fall after putting them on hold when the COVID-19 pandemic began, masks are an important part of those reopening plans.⁵ Federal courts are also issuing their own mask orders.⁶ Indeed, the central website for the U.S. courts notes that “federal courts are increasingly requiring people entering courthouses to wear face masks.”⁷

In some jurisdictions, courtroom mask requirements exist but are pliable. In Arizona, for example, the state supreme court’s administrative

⁴ See INDIANA SUPREME COURT OFFICE OF JUDICIAL ADMINISTRATION, RESUMING OPERATIONS OF THE TRIAL COURTS: COVID-19 GUIDELINES FOR INDIANA’S JUDICIARY 14 (May 13, 2020), <https://www.in.gov/judiciary/files/covid19-resuming-trial-court-operations.pdf> [https://perma.cc/QP29-SEQN]; In the Matter of Resuming In-Person Court Services During COVID-19, at 5–6 (Iowa July 9, 2020), https://www.iowacourts.gov/static/media/cms/7920_resumption_of_in_person_servic_EBE_9D2A41AB27.pdf [https://perma.cc/3ERP-6TNH]; Re: Requiring Masks in Appellate and District Courts, No. 2020-PR-090, at 1 (Kan. July 2, 2020), <https://www.kscourts.org/KSCourts/media/KsCourts/Orders/2020-PR-090.pdf> [https://perma.cc/YDV2-R93S]; In the Matter of the Use of Protective Face Coverings in New Mexico Courts During the Covid-19 Public Health Emergency, No. 20-8500-017 (N.M. May 15, 2020), https://www.nmcourts.gov/uploads/files/COVID-19/Order%20No_%2020-8500-017%20Requiring%20Use%20of%20Face%20Masks%20in%20NM%20Courts%20During%20COVID-19%20PHE.pdf [https://perma.cc/AP2P-JVAQ]; Press Release, New York State Unified Court System, New York State Court System to Begin Return to In-Person Courthouse Operations (May 13, 2020), https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_17.pdf [https://perma.cc/6RNM-8UGZ]; OHIO JURY TRIAL ADVISORY GROUP, STANDARDS AND PRACTICES ESSENTIAL TO THE RESUMPTION OF JURY TRIALS IN OHIO: REPORT AND RECOMMENDATIONS 8 (May 12, 2020), https://www.clemetrobar.org/CMBA_Prod/cmbadocs/covid-19/Ohio%20Jury%20Trial%20Advisory%20Group%20-%20Report%20%20Recommendations.pdf [https://perma.cc/F9XH-XD36]; Order Regarding Face Covers, No. ADM2020-00428, at 1 (Tenn. July 9, 2020), https://www.tncourts.gov/sites/default/files/docs/order_regarding_face_coverings.pdf [https://perma.cc/PZT9-P8K8]; COVID-19 Resumption of Operations Protocols, at 7 (W. Va. May 6, 2020), <http://www.courtswv.gov/covid19/ResumptionOfOperations-ProtocolsandMap5-6-20.pdf> [https://perma.cc/F7ZA-AJQW].

⁵ See, e.g., Press Release, New Jersey Judiciary to Resume Jury Trials, New Jersey Courts (July 22, 2020), <https://njcourts.gov/pressrel/2020/pr072220a.pdf?c=f4f> [https://perma.cc/Z32B-JYCY] (outlining plans for jurors “and others” to wear masks as jury trials resume in state); Vinny Vella, *Jury Trials Will Resume in Some Courtrooms Across the Philly Region After Months of Coronavirus Restrictions*, PHILA. INQUIRER (July 30, 2020), <https://www.inquirer.com/news/courts-coronavirus-suburban-jury-trials-bucks-chester-montgomery-county-20200730.html> [https://perma.cc/V3HG-ZYAX] (describing masks as part of plans for reopening Philadelphia courts).

⁶ See, e.g., Face Covering Requirements During COVID-19, No. 20-18, at 1 (D. Alaska May 27, 2020), https://www.akd.uscourts.gov/sites/akd/files/20-18_MGO_Face_Covering_COVID-19.pdf [https://perma.cc/78RE-X7Z9].

⁷ See *Judiciary Preparedness for Coronavirus (COVID-19)*, U.S. Cts. (Mar. 12, 2020), <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19> [https://perma.cc/X6K3-U4TV].

order requires masks for court employees, staff, visitors and participants.⁸ In Arizona's Maricopa County, however, a judicial officer has discretion to ask a testifying witness to remove or pull down their mask while testifying if "deemed necessary" and so long as appropriate distancing measures are followed.⁹ Wisconsin similarly explicitly provides that judges may order witnesses to remove masks "to preserve the ability to weigh the witness's credibility."¹⁰ Minnesota has a similar provision.¹¹ By contrast, Massachusetts' order suggests that only accommodation requests for health reasons will be considered, and those must be made in advance to the court's ADA coordinator.¹² In some states, such as North Carolina, masks are required only in some locations.¹³ Despite these caveats, masks will likely continue to be seen as essential safety equipment if courts are to function in any in-person capacity prior to the widespread availability of a vaccine or the discovery of an effective treatment for COVID-19.

While requiring masks in the courtroom may seem a relatively small adjustment for the legal system to make in a pandemic, it is not. As many of us have now experienced when we interact with mask-wearing friends, supermarket clerks, or passersby, the mask changes our ability see facial expressions and sometimes even to recognize friends. For many of us, this is a minor inconvenience. For the legal system, however, the mask requirement contravenes a central tenet of this country's credibility jurisprudence: that demeanor is fundamental to assessing the credibility of witnesses.

⁸ See *Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations*, No. 2020-75, at 3 (Ariz. May 8, 2020), <http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-75.pdf> [<https://perma.cc/U9VG-NYFH>].

⁹ *Restricting Physical Access to Court Facilities Due to a Public Health Emergency and Transition to Resumption of Certain Operations*, No. 2020-078, at 3 (Ariz. Super. Ct. May 22, 2020), <http://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/AdminOrders/AO%202020-078%20Amended.pdf> [<https://perma.cc/ZF5L-Z59R>].

¹⁰ *In Re The Matter of the Resumption of In-Person Proceedings in Attorney Regulatory Matters During the COVID-19 Pandemic* (Wisc. June 8, 2020), <https://www.wicourts.gov/news/docs/attyreg.pdf> [<https://perma.cc/L7TB-3TTP>].

¹¹ See *Safely Reopening Court Facilities*, MINNESOTA JUDICIAL BRANCH, <http://www.mncourts.gov/Reopening.aspx> [<https://perma.cc/72MK-ZZAF>].

¹² See *Second Order Regarding Public Access to State Courthouses & Court Facilities*, No. OE-144 (Mass. July 7, 2020), <https://www.mass.gov/doc/supreme-judicial-court-third-order-regarding-public-access-to-state-courthouses-court/download> [<https://perma.cc/LC6S-LHU5>]; *What to Know Before Going to a Courthouse During COVID-19*, MASS.GOV (July 10, 2020), <https://www.mass.gov/info-details/what-to-know-before-going-to-a-courthouse-during-covid-19#visiting-a-court> [<https://perma.cc/3KAK-7BHC>].

¹³ See *COVID-19 (Coronavirus) Updates*, N.C. JUD. BRANCH, <https://www.nccourts.gov/covid-19> [<https://perma.cc/8YW9-3Y33>].

When courts grapple with questions about mask-wearing by witnesses, they will face a number of doctrinal headwinds. From the Immigration and Nationality Act to the Federal Rules of Civil Procedure to the Confrontation Clause, Congress and the courts have made clear that assessing demeanor is essential to credibility judgments. There are some straightforward questions that arise from this conflict between mask-wearing and the law's emphasis on demeanor. One is whether it is possible to really evaluate a witness's demeanor when the lower portion of that person's face is covered. To the extent courts have addressed this question, the answer has been that obscuring the nose, mouth and chin renders it impossible to "read" demeanor. The question that follows is whether this presents an insurmountable barrier to witnesses testifying in masks. For reasons discussed below, the answer to this question is that it should not.

Beyond these doctrinal questions, however, mask-wearing in the courtroom by witnesses offers us an important opportunity to reassess the law's emphasis on demeanor. Demeanor is understood to be a guide to a witness's credibility in the sense that we can "read" it for clues to a person's truthfulness. Probing behind this assumption reveals it to be both culturally mediated and without basis in science, rather than reflecting a truism about human beings. Other cultures have different expectations about the revelatory nature of demeanor that, in turn, reflect different beliefs about the relationship between the internal and the external. Further, "reading" demeanor is often largely an exercise in drawing comparisons between the reader's expectations about how a forthright or honest person should look, sound or otherwise appear. Nevertheless, demeanor has remained at the forefront of our credibility assessment apparatus, sending a behavioral signal to those who wish to be believed in the courtroom that their outward bearing will determine how they are judged. To the extent possible, they must perform credibility. Mask-wearing has the potential to render such performances less essential. For reasons discussed below, this change could well be salutary—a chance to unmask demeanor doctrine's false promise of accuracy.

Part I of this Essay sketches out demeanor's central place in this country's credibility jurisprudence. Part II offers a critique of this focus on demeanor. Part III argues that mask-wearing by witnesses offers an opportunity for courts to move away from an emphasis on demeanor, a move that may actually enhance the fact-finding that goes on in our courtrooms.

I. Demeanor Evidence

Demeanor, the outward bearing of a person,¹⁴ represents a key indicator of credibility as it is understood in United States law. The U.S. Supreme Court treats it as axiomatic that when an “issue involves the credibility of witnesses” it “therefore turns largely on an evaluation of demeanor.”¹⁵ Indeed, the notion that demeanor is central to credibility “has long been a pillar in jurisprudence.”¹⁶ The belief that seeing a person’s outward bearing is essential to evaluating his or her testimony is one reason why the hearsay rule privileges live testimony.¹⁷ Without a witness in court, the theory goes, the fact-finder can’t see her shifty eyes or earnest expression and decide whether to believe her testimony. This also explains why demeanor is first on Congress’s list of bases for immigration judges’ credibility determinations. In the Immigration and Nationality Act,¹⁸ Congress provides that immigration judges may base their credibility determinations on “the demeanor, candor, or responsiveness of the applicant or witness,” among other things.¹⁹

Continuing the theme, Rule 52(a) of the Federal Rules of Civil Procedure, specifies a clear error standard of review for appellate courts reviewing trial courts’ findings of fact, largely because appellate judges are not privy to the demeanor of the witnesses.²⁰ As the Supreme Court has explained, the trial judge is the only one who may observe the “variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”²¹ Indeed, appellate courts will “overturn credibility determinations only where a witness’s testimony is impossible under the laws of nature or incredible as a matter of law—an extraordinarily high standard.”²² Appellate courts can have little to say about

¹⁴ See *Demeanour*, OXFORD ENG. DICTIONARY, <https://www-oed-com.proxygw.wrlc.org/view/Entry/49617?redirectedFrom=demeanor#eid> [https://perma.cc/3QLE-JJNS].

¹⁵ *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

¹⁶ Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1338 (2015).

¹⁷ See Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 963 (1974); see also Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 880 (2018).

¹⁸ 8 U.S.C. § 1101 et seq. (2018).

¹⁹ § 1158(b)(1)(B)(iii).

²⁰ FED. R. CIV. P. 52(a)(1)(6).

²¹ *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (citing *Wainwright v. Witt*, 469 U.S. 412 (1985)).

²² Bennett, *supra* note 16, at 1350; see *Lukaneva v. Levy Rests. at McCormick Place*, No. 05 C 6159, 2006 WL 1823169, at *5 (N.D. Ill. June 29, 2006) (noting that credibility determinations based on demeanor are “usually insulated from appellate review”).

this aspect of credibility because without having been present at trial, an appellate judge could not possibly assess the cues that make up the witness's demeanor, such as "facial expressions, eye contact, attitude, body language, length of pauses, hesitation, sincerity, gestures, candor, tone of voice, expression, dress, [and] grooming habits."²³ Although other elements of credibility—including inconsistencies, responsiveness, or personal attributes—might theoretically be reviewable by an appellate court, the view that demeanor is critical most often works to insulate credibility findings from meaningful appellate review.

As a matter of evidence law, demeanor is a hybrid. It is both privileged through the rules barring hearsay and unregulated in the sense that no evidentiary rules directly govern demeanor evidence. Indeed, Wigmore explained that a witness's demeanor, "without any definite rules as to its significance, is always assumed to be in evidence."²⁴ More recently, Bennett Capers has catalogued demeanor among what he terms, "evidence without rules"—information that fact-finders may use to make judgments but that is not governed by formal evidentiary provisions.²⁵

One noteworthy exception to this is Michigan Rule of Evidence 611(b), which gives courts in that state "reasonable control over the appearance of parties and witnesses" in order to "ensure that the demeanor of such persons may be observed and assessed by the fact-finder."²⁶ This provision was evidently passed in response to a case in which a Michigan trial judge ordered a plaintiff to remove her niqab, which covered her whole face other than her eyes.²⁷ When the plaintiff explained that her religious beliefs would permit her to remove the niqab only in front of a female judge, the trial court dismissed her case.²⁸ In response, the amenders of Michigan's rule decided to codify their belief that it is not possible to assess credibility unless a witness's "demeanor . . . may be observed and assessed by the fact-finder."²⁹

²³ See Bennett, *supra* note 16, at 1338.

²⁴ 2 JOHN HENRY WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 946 (2d ed. 1923).

²⁵ Capers, *supra* note 17, at 869.

²⁶ MICH. R. EVID. 611(b).

²⁷ See Adam Schwartzbaum, Comment, *The Niqab in the Courtroom: Protecting Free Exercise of Religion in A Post-Smith World*, 159 U. PA. L. REV. 1533, 1534–35 (2011).

²⁸ *Id.* Of course, the issue of religious garments that obscure witnesses' faces brings up First Amendment concerns that are absent when the face coverings at issue are medical in nature. Yet the related demeanor issues are largely the same as those raised by mask-wearing with the important distinction that when a religious face covering is at issue, generally only those observing that religion in the courtroom would be so covered.

²⁹ See Schwartzbaum, *supra* note 27, at 1535 (citing Order Amending Rule 611 of the Michigan Rules of Evidence at 1, ADM File No. 07-0013 (Mich. Aug. 25, 2009)). Although such rules have not been widely adopted in U.S. jurisdictions, Canada's Supreme Court cited

In the criminal context, the Sixth Amendment right of a criminal defendant “to be confronted with the witnesses against him” reinforces the centrality of demeanor to credibility assessment.³⁰ The Supreme Court has identified demeanor as one of “the elements of confrontation,”³¹ through which a fact-finder may judge “whether [a witness] is worthy of belief.”³² In cases involving challenges to testimony by witnesses wearing disguises, the lower courts have struggled to reconcile the confrontation right with the state’s asserted interest in protecting the witness. For example, the Ninth Circuit held that a criminal defendant’s rights under the Confrontation Clause had not been violated when a witness was permitted to testify wearing a wig and mustache.³³ Adopting the Supreme Court’s test from *Maryland v. Craig*,³⁴ a case involving remote testimony from an alleged child victim of sexual abuse, the Ninth Circuit found that the disguise was “necessary to further an important state interest, namely a witness’s safety.”³⁵ Importantly, however, the Ninth Circuit also held that “the reliability of the . . . testimony was otherwise assured, because . . . despite his disguise, the jury was able to hear [the witness’s] voice, see his entire face including his eyes and facial reactions to questions, and observe his body language.”³⁶ The court explained that “[t]hese are all key elements of one’s demeanor that shed light on credibility.”³⁷ Similarly, the U.S. District Court for the District of Montana last year ordered that in order to disguise his identity, an informant in a criminal case could testify wearing a wig, a false beard or mustache, and false eyeglasses with clear lenses without jeopardizing the defendant’s rights under the Confrontation Clause.³⁸

By contrast, in a similar case, the Texas Court of Criminal Appeals held that a disguised witness’s testimony did violate the defendant’s rights under

a “deeply rooted presumption . . . that seeing a witness’s face is important to a fair trial” because it facilitates “credibility assessment” when it held in 2013 that niqabs could be banned in Canadian courtrooms in many cases. *N.S. v. Her Majesty the Queen*, [2012] 3 S.C.R. 726, 728 (Can.).

³⁰ U.S. CONST. amend. VI. Demeanor is also understood to be important at both sentencing and plea hearings, although in these contexts the fact-finder is using demeanor not just to assess credibility but to evaluate other characteristics of the defendant, such as remorse. See, e.g., M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 320 (2018) (describing perceived importance of demeanor at sentencing as an indicator of remorse).

³¹ *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

³² *Id.* at 845. (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)).

³³ See *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1120 (9th Cir. 2013).

³⁴ 497 U.S. 836, 846 (1990).

³⁵ *de Jesus-Casteneda*, 705 F.3d at 1120.

³⁶ *Id.* at 1121 (emphasis added).

³⁷ *Id.*

³⁸ See *United States v. Alameti*, No. CR 19-13-BU-DLC, 2019 WL 3778372, at *3 (D. Mont. Aug. 12, 2019).

the Confrontation Clause.³⁹ In that case, the witness testified with a baseball cap pulled low and wearing a jacket turned up and fastened so that it obscured his “mouth, jaw, and the lower half of his nose.”⁴⁰ Observing that the face is “the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility,” the court held that the attempted disguise violated the defendant’s Confrontation Clause rights and reversed his conviction.⁴¹ It is hard to say how salient the face covering was to the Confrontation Clause violation because the government’s claimed justification for the disguise was itself quite flimsy. The government claimed the witness was trying to protect himself from retaliation, but his name and address were already known to the defendant.⁴²

This sparse case law on disguises in court offers two lessons. First, mask-wearing by witnesses in criminal cases would have to be justified by an important state interest in order to pass muster under the Confrontation Clause, and even then courts may still find that it infringes defendants’ rights. Second, and perhaps more importantly, under current doctrine that identifies the nose, mouth, and jaw as integral to “the most expressive part of the body,”⁴³ the use of a face covering that obscures this part of the face will be vulnerable to challenge on the ground that it prevents the fact-finder from judging demeanor.⁴⁴

II. CRITIQUING DEMEANOR

The law’s insistence that it is easier to evaluate credibility in person and with reference to demeanor reflects deeply held cultural assumptions.

³⁹ *Romero v. State*, 173 S.W.3d 502, 506–07 (Tex. Crim. App. 2005).

⁴⁰ *Id.* at 503.

⁴¹ *Id.* at 506.

⁴² *See id.* at 506.

⁴³ *Id.* at 506.

⁴⁴ This is already happening. In Israel, for example, Prime Minister Benjamin Netanyahu’s defense attorneys recently demanded that his corruption trial be postponed because everyone in the courtroom, including witnesses, would have to wear masks. The attorneys argued that it would be difficult to assess witnesses’ truthfulness if they testified in masks. *See Netanyahu’s Corruption Trial to Hear First Witnesses in January*, REUTERS (July 19, 2020, 3:26 AM), <https://www.reuters.com/article/us-israel-netanyahu-trial/netanyahus-corruption-trial-to-hear-first-witnesses-in-january-idUSKCN24K076>. In the U.S., one judicial response to concerns about Confrontation Clause challenges to witnesses in masks has been to order witnesses to testify while wearing transparent masks. *See Maria Dinzeo, Judge Orders Transparent Masks for Witnesses in Criminal Trial*, COURTHOUSE NEWS SERV. (July 16, 2020), <https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/> [<https://perma.cc/8ACD-HMM4>]. Whether these masks are actually see-through enough to make a difference to juror’s ostensible ability to “read” demeanor is an open question.

Psychology researchers have found that in North American cultures, “demeanor is expected to be a direct reflection of reality without substantial discrepancy.”⁴⁵ This belief has ancient roots and can be traced back to Aristotle and later to Hume and Jung.⁴⁶ Psychologists point to the American emphasis on direct communication and candid emotional displays, as well as to popular aphorisms such as “speak your mind” as evidence of a culture that demands that one’s demeanor correspond with one’s “core identity.”⁴⁷

Given this belief, it is not surprising that we use demeanor evidence to “make inferences about the reality of others and the world.”⁴⁸ Studies conducted in North America of political candidates,⁴⁹ corporate workplaces,⁵⁰ and athletes⁵¹ all have found that the more people appear to be competent or physically commanding or athletic, the more they are perceived to be so. Yet this belief that demeanor will accurately reflect a person’s inner qualities is not universal. In China, for example, one meta-analysis found a strong cultural belief that demeanor can deviate from reality, particularly in competitive settings.⁵² This finding emphasizes that it is a cultural assumption to believe that demeanor is a major clue to our judgment of a person and his or her credibility.

There are many reasons the law might wish to validate cultural assumptions about the world, one of which might be that they accurately reflect the world around us. Yet, there is no evidence that we can learn much, if anything, about truthfulness from a person’s demeanor. A 2003 meta-analysis of 116 psychology studies concluded that nonverbal cues are for the most part unrelated to deception.⁵³ A subsequent 2006 meta-analysis of studies on individuals’ ability to detect deceit found that paying attention to visual cues, as compared to auditory and audiovisual cues, may hinder our

⁴⁵ Albert Lee, Li-Jun Ji, Ye Li, & Zhiyong Zhang, *Fear Goliath or David? Inferring Competence From Demeanor Across Cultures*, 46 PERSONALITY SOC. PSYCHOL. BULL. 1074, 1075 (Dec. 31, 2019).

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1074.

⁴⁹ Alexander Todorov, Anesu N. Mandisodza, Amir Goren, & Crystal C. Hall, *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCIENCE 1623, 1623–25 (2005).

⁵⁰ Aaron W. Lukaszewski, Zachary L. Simmons, Cameron Anderson, & James R. Roney, *The Role of Physical Formidability in Human Social Status Allocation*, 110 J. PERSONALITY & SOC. PSYCHOL. 385, 402 (2015).

⁵¹ Iain Greenlees, Andrew Bradley, Tim Holder, & Richard Thelwell, *The Impact of Opponents’ Non-Verbal Behaviour on the First Impressions and Outcome Expectations of Table-Tennis Players*, 6 PSYCHOL. OF SPORT & EXERCISE 103, 112 (2005).

⁵² Lee et al., *supra* note 45, at 1084–85.

⁵³ See Bella M. DePaulo, Brian E. Malone, James J. Lindsay, Laura Muhlenbruck, Kelly Charlton, & Harris Cooper, *Cues to Deception*, 129 PSYCHOL. BULL. 74, 104–06 (2003).

ability to detect lies rather than help.⁵⁴ Additionally, individuals generally perceived messages presented through video cues as less truthful than those presented through audiovisual or audio cues, regardless of the presenter's motivation.⁵⁵ Ironically, if these findings hold true in the courtroom, the U.S. legal system's emphasis on a witness's outward appearance in assessing credibility may result in what psychology researchers term a "lie bias" by shifting fact-finders' focus to visual cues of deception.⁵⁶

Recently, a group of psychology researchers asked why the cultural belief in the efficacy of demeanor—or, in their words, "nonverbally based veracity assessments"—persists "despite the lack of evidence that they actually work."⁵⁷ One of their answers is that it is difficult to move beyond entrenched stereotypes, such as the belief that a liar will look away when telling a lie.⁵⁸ People are extremely resistant to updating their beliefs.⁵⁹ The researchers also suggest that the belief in demeanor as a lie-detection tool is reinforced by being shared and communicated so prevalently in the culture.⁶⁰ In addition, they point out that there are situations, such as during certain phases of an investigation, when direct questioning is not possible and demeanor is the only information available.⁶¹ In these scenarios, we have no alternative but to rely on nonverbal cues. A final explanation is that humans have an innate ability to recognize faces and to correlate remembered faces with the characteristics of people we know.⁶² This makes us believe that we can make the same connection between appearance and character when we form impressions of strangers.⁶³ As psychology professor Alexander Todorov writes, however, what we can actually glean about strangers from

⁵⁴ See Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230–31 (2006).

⁵⁵ See *id.* at 225.

⁵⁶ Aldert Vrij, Maria Hartwig, & Pär Anders Granhag, *Reading Lies: Nonverbal Communication And Deception*, 70 ANN. REV. PSYCHOL. 295, 307–08 (2019) (explaining that since 2006, no research has shown that observing behaviors alone leads to improved accuracy of lie detection).

⁵⁷ *Id.* at 308.

⁵⁸ See *id.* at 311.

⁵⁹ See *id.*; see also, e.g., Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic, & C. K. Mertz, *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. Empirical Legal Stud. 465, 469–70 (2007) (describing resistance to updating beliefs, particularly if beliefs conform with group identity and are challenged by "out-group" sources); ALEXANDER TODOROV, FACE VALUE: THE IRRESISTIBLE INFLUENCE OF FIRST IMPRESSIONS 261 (2017) (describing getting over the "illusion" that there is a correspondence between appearance and character as "almost impossible").

⁶⁰ See Vrij et al., *supra* note 56, at 311.

⁶¹ See *id.* at 309.

⁶² See TODOROV, *supra* note 59, at 261.

⁶³ See *id.*

looking at their faces “mainly reflect[s] our [own] circumstances: cultural upbringing, wealth, social class, peer groups, and aspirations.”⁶⁴

The above theories provide some possible explanations for demeanor’s privileged place in the legal system, but they do not justify it. In the courtroom, it is close to a legal impossibility for the jury to be forced to rely on demeanor in the absence of verbal or other cues. Testimony in most cases comes from a witness who is present on the witness stand or, less commonly, from someone who is wholly absent from the courtroom, but has been deposed or made a statement that satisfies a hearsay exception. In situations where a defendant has invoked her Fifth Amendment right against self-incrimination, it is impermissible to make any inference from her demeanor, just as it would be to force her to testify. Reliance on unsupported pseudoscience is also generally rejected by the legal system,⁶⁵ although it admittedly struggles to hold itself accountable to that commitment.⁶⁶ Equally troubling is the likelihood that the law itself plays an integral role in perpetuating the cultural belief that we can rely on visual cues of deception. In a cycle of disinformation, the law’s emphasis on demeanor may reinforce the cultural belief that demeanor is crucial to assessing a witness’s credibility, even as the culture bolsters the law’s own insistence on the same idea.⁶⁷

Although much of the social scientific research on demeanor has been canvassed in the legal academy,⁶⁸ it has had no discernable imprint in the case law. To the extent that the problems with using demeanor as a credibility indicator have surfaced at all, it has not been to recognize that demeanor bears a questionable relationship to truthfulness. Rather, some judges have recognized that the significance of demeanor may vary depending upon cultural context. As Judge Posner wrote for a unanimous panel reviewing an asylum determination under the Immigration and Nationality Act, “even if the applicant testifies in English, as a foreigner his demeanor will be difficult for the immigration judge to ‘read’ as an aid to determining the applicant’s

⁶⁴ *Id.*

⁶⁵ See, e.g., *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592–95 (1993) (holding that before admitting expert testimony under Federal Rule of Evidence 702, trial judges must make a preliminary assessment of whether expert testimony is based upon scientifically valid reasoning or methodology and is applicable to the facts at issue).

⁶⁶ See Jessica D. Gabel, *Realizing Reliability in Forensic Science from the Ground Up*, 104 J. CRIM. L. & CRIMINOLOGY 283, 348–50 (2014) (describing barriers to more accurately using forensic science in courts).

⁶⁷ For example, when she ordered that witnesses testify wearing transparent masks, San Francisco Superior Court Judge Vedica Puri explained that it would avoid Confrontation Clause difficulties, but she also said, “I’m very sympathetic to the notion of reading faces.” Dinzeo, *supra* note 44.

⁶⁸ See generally Bennett, *supra* note 16, at 1346–1348.

credibility.”⁶⁹ In the same opinion, Judge Posner offered an alternative to privileging demeanor. He suggested that the government might instead provide actual studies of the behavior of asylum applicants that would help judges better evaluate the credibility of their claims.⁷⁰ “Without such systematic evidence,” he wrote, “immigration judges are likely to continue grasping at straws,” including misleading cues from the demeanor of the applicants.⁷¹ For Judge Posner, the problem was essentially that cultural competence is one key to “reliable determinations of credibility” and that in immigration cases such competence is generally lacking.⁷²

Yet this is precisely the problem with privileging demeanor in the courtroom. By giving so much weight to demeanor evidence, the law creates behavioral prescriptions that someone unfamiliar with those prescriptions cannot hope to follow. The web of procedural rules and common law doctrines that establish the primacy of demeanor also establish rewards for an exterior that complies with expectations. Appearing believable, in other words, is equated with being believable. The descriptive claim has been superimposed on what is, in reality, a normative position about conformity with social beliefs about believability. In this way, the social construct of credibility offers a mechanism through which the behavioral norms of powerful and educated judges, or of a set of “representative” jurors, are made manifest in the law.

Judge Posner and two of his colleagues on the Seventh Circuit were able to recognize the culturally-contingent nature of demeanor evidence in the context of assessing the credibility of immigrant witnesses, whose acculturation is obviously—and excusably—different from that of the judges who evaluate them. Critical race theorists have argued, however, that the primacy of demeanor also has serious implications for African Americans in the courtroom.⁷³ Beyond national origin, a person’s outward bearing may also be a guide to her race, as well as her level of education, her social class, and her level of comfort in speaking on the witness stand.⁷⁴ In prioritizing demeanor, U.S. law indicates that these features matter to credibility. At the same time, focusing so intently on demeanor necessitates imagining an expected communicative style and affect to which the witness’s behavior can be compared.

⁶⁹ *Djouma v. Gonzales*, 429 F.3d 685, 687 (7th Cir. 2005).

⁷⁰ *See id.* at 688.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See, e.g.,* Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 476–77 (2016) (describing the emphasis on demeanor as a mechanism for reinforcing penalties for nonwhite racial performance in the courtroom).

⁷⁴ *See id.*

While Judge Posner's opinion recognizes that immigration judges may not understand the demeanor of immigrant witnesses, the implication is that people from this country should or will comply with expressive norms that allow us to identify when they are being less than truthful. This assumption ignores the psychological literature sketched above. It also ignores the scholarship pointing out that the courtroom is still in many ways shaped to reward methods of communicating that are largely white and male.⁷⁵ This has led scholars to theorize a "demeanor gap" along lines of race and also gender.⁷⁶ With respect to race, this gap encompasses a multitude of stereotypes about African Americans, including those about intelligence, honesty, and propensity for violence.⁷⁷ For female victims of sexual assault or domestic violence, stereotypes may also lead fact-finders to discredit their accounts.⁷⁸ Witnesses whose behavior or appearance "diverges from the observer's expectation"—namely, the white male normativity of the courtroom—are perceived as less credible.⁷⁹

III. DEMEANOR AND COVID-19

New rules requiring witnesses to wear masks in court pose a fundamental challenge to the way that the U.S. legal system has approached judging credibility. If demeanor is so essential to assessing the credibility of witnesses, what does it do to our ability to render judgments when we require witnesses to testify while in masks?

Although few would argue that wearing masks while in public is one of the positives to come out of the COVID-19 pandemic, it does present an opportunity to reassess the legal system's insistence on the primacy of demeanor evidence.⁸⁰ Do we gain anything by seeing a witness's full face? Put another way, is anything lost when we have less access to, and therefore less ability to focus on demeanor? This is a question that we might actually study during this time of mask-wearing in court. From what the social scientific research into visual indicators of lying has found, it would be

⁷⁵ *Id.*

⁷⁶ Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 42, 53–54 (2000); Carlin, *supra* note 73, at 474–77.

⁷⁷ See Rand, *supra* note 76, at 42; see also Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 329–31 (1996).

⁷⁸ See Regina A. Schuller, Blake M. McKimmie, Barbara M. Masser, & Marc A. Klippenstine, *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. REV. 759, 768 (2010).

⁷⁹ Carlin, *supra* note 73, at 468.

⁸⁰ This reassessment, if it needs further justification, could also be a way to respond to the troubling example of Michigan prioritizing demeanor evidence over a litigant's religious convictions. With the increasing diversity of the country, the issue of religious coverings in the courtroom is likely to arise with increasing frequency.

surprising if our ability to find facts suffers. Indeed, based on that research, we might expect the accuracy of judicial outcomes to improve. And if that is the case, we might ask why we continue to place demeanor at the center of our credibility judgments. Do we, in fact, lose something by seeing a witness's full face?

There is some direct evidence that we might. A recent mock juror study sought to test whether niqab-wearing by witnesses would hamper truth-seeking in the courtroom.⁸¹ The study confirmed that participants were no better than chance in evaluating the truthfulness of witnesses in street clothes.⁸² When witnesses wore niqabs, which cover the face but not the eyes, or hijabs, which cover the hair and neck but not the face, observers' performance at detecting lies improved to above chance levels.⁸³ The researchers hypothesize that the niqab and hijab, by limiting the amount of visual information available, forced participants to "base their decisions on verbal cues."⁸⁴ They note that when witnesses wore niqabs, some observers did not watch and instead simply listened to the testimony.⁸⁵ If this study result is an indication of what might transpire in actual courtrooms, the somewhat startling implication is that less is more when it comes to demeanor evidence.

Of course, it is also plain, however unintentionally, that demeanor has come to play an important role in managing the distribution of authority between trial and appellate courts. A lower court's judgment based on demeanor is essentially unassailable on appeal. This limits the potential for reversal in ways that might be salutary, most obviously from an efficiency standpoint. It also offers trial courts a mechanism for shielding judgments from review. As a doctrine that regulates reviewability and empowers trial courts, demeanor doctrine takes on different connotations that deserve further study. Nonetheless, the argument that demeanor doctrine provides an institutional benefit still depends on its ability to produce more accurate or just outcomes in the aggregate.

Because there are so few rules governing it, the legal barriers to demoting demeanor evidence should not be insurmountable.⁸⁶ As described

⁸¹ See Amy-May Leach, Nawal Ammar, D. Nicole England, Laura M. Remigio, Bennet Kleinberg, & Bruno J. Verschuere, *Less is More? Detecting Lies in Veiled Witnesses*, 40 L. & HUM. BEHAV. 401 (2016).

⁸² *Id.* at 407.

⁸³ *See id.*

⁸⁴ *Id.* at 408. Participants did, however, continue to rely on eye-tracking when evaluating witnesses. *See id.*

⁸⁵ *Id.*

⁸⁶ WIGMORE, *supra* note 24, at § 946 (noting that there are no "definite rules as to [the] significance" of witness demeanor).

in Part II, both judges and scholars have identified problems with the assumption that we can read anything more than superficial, culturally-attenuated facts about a witness from his or her face.⁸⁷ The jurisprudence on demeanor describes it as a guide to a witness's true inner feelings.⁸⁸ Yet demeanor doctrine in practice sets up behavioral prescriptions which many witnesses will be unable to follow for reasons that have nothing to do with their integrity or the truthfulness of their statements.⁸⁹ If this is so, other equally august legal doctrines, from equal protection to the allocation of substantive law-making to democratically elected bodies to the prohibition on propensity evidence, could be marshaled to show why demeanor should have no privileged place in our evidentiary system—a system which, after all, is billed as almost exclusively procedural.

As a matter of Constitutional law, as described in Part I, Confrontation Clause jurisprudence may pose the greatest legal obstacle to mask-wearing witnesses. That doctrine situates demeanor as one of the four elements of confrontation.⁹⁰ At the same time, the Court has created exceptions when such a modification is “necessary to further an important state interest.”⁹¹ It is hard to imagine any court applying that test to hold that controlling a pandemic is not an important state interest. Might the Court be persuaded to go farther and remove demeanor from the list of elements of confrontation? That seems unlikely, at least in the present moment.

What is perhaps more imaginable is that the repeat players engaged in the nitty gritty of trial practice might take this moment to reevaluate demeanor. How important is it really? If one reason we cling to our belief in visual cues of deception is that stereotypes are very difficult to break, this type of enforced and sudden change to our ability to see each other's faces may be the type of event that can break down our unthinking reliance on demeanor.⁹² Might our judges find themselves more receptive to information about the potential for demeanor to be misleading rather than truth-enhancing once they operate in masked courtrooms for a period of time?

⁸⁷ *Supra* text accompanying notes 69–79.

⁸⁸ *See, e.g.,* *United States v. de Jesus-Castaneda*, 705 F.3d 1117, 1118 (9th Cir. 2013) (“Just as an audience assesses a character’s vulnerability and emotions by watching the actor’s demeanor, so too does a jury assess a witness’s credibility and emotions by examining the witness’s demeanor and eyes.”).

⁸⁹ *See supra* text accompanying notes 73–79.

⁹⁰ *See* *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

⁹¹ *See id.* at 852.

⁹² Indeed, one trial judge wrote to me that she and her colleagues have found when conducting masked proceedings that seeing only a witness’s eyes has sharpened their focus on witness’s emotion and presence, in part because it has made it less intimidating or awkward to actually look witnesses in the eye.

Another less promising possibility is that not all witnesses wearing masks will be perceived equally. African American men, in particular, have expressed concern about wearing masks in public, fearing that they will be perceived as threatening.⁹³ This potential for mask-wearing to exacerbate biases in the courtroom is extremely troubling. Of course, it is possible that such biases might be muted in a courtroom in which all participants are masked, particularly if the masks are uniform and provided by the court. Still, even the possibility that masks could heighten disbelief of some witnesses or reinforce negative stereotypes highlights why demeanor is such a poor proxy for truthfulness. In this instance, masks would be the product of a viral pandemic and a judicial order, which it is relatively easy to see are external to the witnesses and therefore unrelated to their credibility. Yet our features, and to an extent our expressions—which research shows often simply mimic the expressions being made by our interlocutors⁹⁴—are equally the product of external forces beyond our control. Despite this, demeanor doctrine commands that fact-finders consider witnesses' appearance, masked or otherwise, in deciding whether to believe them.

With the important exceptions discussed above, the primacy of demeanor in our legal system is largely a matter of common law and practice. The common law is prized for its ability to evolve in a measured, yet responsive way. Mask-wearing witnesses could be the catalyst for such an evolution. This experience might show us the inutility of “reading” demeanor as a guide to truth in the courtroom, as well as the impossibility of ignoring stereotypes and cultural referents when we are directed to consider the outward bearing of those giving testimony in court.

In sum, by donning masks in the courtroom, we might be able to unmask demeanor doctrine for what it is: a choice to privilege certain appearances over others. Indeed, if we are vigilant in monitoring masks' potential to trigger racial profiling—and perhaps require that courtroom masks be uniform, court-issued varieties—masks could be universalizing.⁹⁵ When not only all witnesses, but all judges and attorneys must appear in masks, the resulting tableau has the potential to unite us in our noseless and chinless commonality. Rather than requiring that only some citizens don

⁹³ See Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html> [https://perma.cc/4KMR-4HR4].

⁹⁴ See, e.g., Korrina A. Duffy & Tanya L. Chartrand, *Mimicry: Causes and Consequences*, 3 CURRENT OP. IN BEHAV. SCIS. 112 (2015) (reviewing recent findings in mimicry literature and describing ubiquity of mimicry of facial expressions).

⁹⁵ As Professor Capers suggested to me, without requiring uniform masks, the particular appearance of each witness's mask might itself become overly significant for the fact-finder.

metaphorical masks of conformity—as Paul Laurence Dunbar described in his poem, “We Wear the Mask”⁹⁶—could we gain from replacing those figurative masks with physical masks for all? While demeanor doctrine demands that we focus on outward appearance as a manifestation of what is within, masks may force a reckoning with that equation and direct our attention to the more tangible—and demonstrably useful—factual information on offer at a trial or hearing. There is reason to believe that this change would be salutary along the dimension that should be of greatest concern to the evidentiary system: finding the truth.

⁹⁶ PAUL LAURENCE DUNBAR, *We Wear the Mask*, in THE COMPLETE POEMS OF PAUL LAURENCE DUNBAR 71 (Dodd, Mead & Co. 1922).